No. 90-906

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY, *et al.*,
Petitioners,

v.

CITIZENS FOR THE ABATEMENT OF
AIRCRAFT NOISE, INC., *et al.*,
Respondents,

UNITED STATES OF AMERICA,
Intervenor.

**On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit**

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

In 1987, the federal Executive and Congress, together with the executives and legislatures of the Commonwealth of Virginia and the District of Columbia, solved a seemingly intractable regional transportation problem —they transferred control over the airports serving the nation's Capital to an independent, nonfederal body created pursuant to state law. Washington National and Washington Dulles International Airports were long owned and operated by the federal government. Local residents, airport users, officials of both Virginia and the District as well as the airports' owner all recognized the growing need for regional control of the Washington metropolitan airports. But an acceptable means of accomplishing this transfer had proved elusive.

A major step toward a consensual solution occurred when a broad-based advisory commission appointed by Secretary of Transportation Elizabeth Dole recommended that control of the airports be transferred to a regional airports authority. Based on the commission's recommendations, Virginia and the District of Columbia each enacted legislation creating an independent regional authority. Congress then authorized the transfer of the airports to that nonfederal authority subject to certain conditions. To be eligible for such transfer, the nonfederal authority agreed to establish and appoint under state law a review board representing nationwide users of the airports to be composed of nine members of Congress serving in their individual—not legislative—capacities. The independent authority then adopted bylaws, pursuant to state law, which provide for the composition, appointment and specific powers of the review board. Virginia and the District of Columbia amended their enabling statutes to make clear that the authority was empowered to establish such a board.

In the case at bar, a divided court of appeals, overturning decisions by the district court, held the govern-

ing structure of this nonfederal airports authority unconstitutional on federal separation of powers grounds. Therefore, the questions presented are:

1. May the Commonwealth of Virginia and the District of Columbia create an independent nonfederal airports authority and authorize such authority to establish a board of review to represent airport users where (a) the authority appoints to the board, and has the power to remove, Members of Congress serving in their individual capacities and (b) the establishment of the board is a condition of the lease of federal property.

2. Whether a constitutional claim attacking the Board of Review is justiciable when the Board has not taken any action adversely affecting the respondents and the elimination of that Board would not redress the respondents' alleged injury.

PARTIES TO THE PROCEEDINGS

Petitioners are the Metropolitan Washington Airports Authority and its Board of Review. The Metropolitan Washington Airports Authority is a nonfederal public body corporate and politic with no parent company or subsidiary.

Respondents are Citizens For The Abatement Of Aircraft Noise, Inc., John W. Hechinger, Sr. and Craig H. Baab.

The United States of America exercised its statutory right to intervene in the court of appeals as a party and will appear in this Court because the constitutionality of an Act of Congress has been challenged.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit and an opinion dissenting therefrom are reported at 917 F.2d 48 (D.C. Cir. 1990), and are reprinted in Appendix ("App.") A to the Petition for a Writ of Certiorari of the Metropolitan Washington Airports Authority, *et al.* (Pet. App.

1a).[1] The opinion of the district court is reported at 718 F. Supp. 974 (D.D.C. 1989), and is reprinted as App. C at Pet. App. 29a.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the District of Columbia were entered on October 26, 1990. The judgment was stayed by order of the court of appeals entered on December 6, 1990. App. B at Pet. App. 28a. The petition for writ of certiorari was filed on December 10, 1990 and granted on January 14, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

United States Constitution, art. I, § 1; § 6, cl. 2; § 7, cl. 2 and 3; art. II, § 1; § 2, cl. 2; and art. IV, § 3, cl. 2.

The Metropolitan Washington Airports Act of 1986, 49 U.S.C. app. §§ 2451-2461 (1988).[2]

1985 Va. Acts ch. 598 and 1987 Va. Acts ch. 665.

D.C. Law 6-67 (1985) and D.C. Law 7-18 (1987).

The constitutional, statutory and other provisions involved are reprinted in App. E at Pet. App. 58a.

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[1] Relevant opinions and the constitutional, statutory and other provisions involved were included in the Appendix to the Petition for a Writ of Certiorari of the Metropolitan Washington Airports Authority, *et al.*, filed on December 10, 1990. Citations to material printed in that appendix appear as "Pet. App. ——a." Citations to other portions of the record below are included in the Joint Appendix filed with this brief. All references to the Joint Appendix appear as "J.A. ——."

[2] All references to the Metropolitan Washington Airports Act of 1986, Pub. L. No. 99-500, 100 Stat. 1783-373, reenacted in Pub. L. No. 99-591, 100 Stat. 3341-376 (codified at 49 U.S.C. app. §§ 2451-2461 (1988)) are cited to the relevant statutory section but omit repeated references to "49 U.S.C. app.".

STATEMENT OF THE CASE

A. Creation Of The Metropolitan Washington Airports Authority By The Commonwealth Of Virginia And The District Of Columbia.

Commercial airports in the United States are operated, almost exclusively, by regional, state or local authorities. Two exceptions were Washington National Airport ("National") and Washington Dulles International Airport ("Dulles"), both owned and operated by the federal government from their opening (in 1941 and 1962, respectively) until March 1987, when they were leased to the newly formed Metropolitan Washington Airports Authority ("Airports Authority" or "Authority"). Over the years, efforts to transfer control of these airports to some type of local ownership had failed due to a lack of agreement among the affected parties as to how best to accomplish such a transfer. To overcome this lack of consensus, the Secretary of Transportation ("Secretary") appointed the broad-based Advisory Commission On The Reorganization Of The Metropolitan Washington Airports (the "Holton Commission," named for its Chairman, former Virginia Governor Linwood Holton) and charged it with developing an acceptable means of transferring control of the metropolitan airports to a state, local or interstate public entity. *See* J.A. 12-24. The Holton Commission recommended to the Secretary that the federally-owned Washington airports be leased as a unit to "a single, independent public authority to be created jointly by the Commonwealth of Virginia and the District of Columbia." J.A. 15.

To this end, the Virginia Assembly enacted legislation, which the Governor signed on April 3, 1985, authorizing creation of a nonfederal regional airports authority to acquire both National and Dulles from the federal government. 1985 Va. Acts ch. 598 (Pet. App. 87a). The City Council of the District of Columbia approved a sub-

stantially identical law which was signed by the Mayor on October 9, 1985. D.C. Law 6-67 (1985) (Pet. App. 119a). The reciprocal Virginia and D.C. statutes, consistent with the recommendations of the Holton Commission, established the Metropolitan Washington Airports Authority as a "public body corporate and politic" "independent" of all state and federal governmental bodies. *E.g.*, 1985 Va. Acts ch. 598, § 2 (Pet. App. 89a). The two jurisdictions empowered the Authority to acquire the airports by lease from the federal government and generally consented, subject to gubernatorial and mayoral approval, to lease conditions set forth by Congress "that are not inconsistent with [the Virginia or District] Act." *Id.* at § 3 (Pet. App. 89a); D.C. Law 6-67, § 4 (1985) (Pet. App. 122a).

B. Authorizing The Lease Of The Airports.

A year later, Congress in the Metropolitan Washington Airports Act of 1986 ("Transfer Act") (Pet. App. 60a) authorized the transfer of the federal airports to the new regional authority created by Virginia and D.C. law. Like the reciprocal D.C. and Virginia enabling statutes, the Transfer Act embodied the recommendations of the Holton Commission "[i]n all significant respects." S. Rep. No. 193, 99th Cong., 1st Sess. 2 (1985). The Act authorized the Secretary to negotiate a 50-year lease with the state-created Authority and directed that certain minimum terms and conditions be incorporated in the lease. § 2454(a); *see* S. Rep. No. 193 at 12-15. Among those conditions and financial obligations was payment of an annual base rental of $3 million, subject to an inflation adjustment. § 2454(b).

C. Integrating Local And Nationwide User Interests In Structuring The Regional Authority.

As provided in the Virginia and District statutes, the Transfer Act required the lessee authority to be independent of federal, state and local governments. § 2456

(b)(1). Congress explicitly recognized that the lessee authority was to have no federal powers or authority, but only those powers that the legislative bodies of Virginia and the District of Columbia conferred on it. § 2456(a). Consistent with the reciprocal Virginia and D.C. legislation, the Authority was to be governed by an 11-member board of directors—five directors appointed by the Governor of Virginia, three by the Mayor of the District of Columbia, two by the Governor of Maryland, and one by the President of the United States with the advice and consent of the U.S. Senate. § 2456(e)(1). To ensure a truly local board, all directors, with the exception of the presidential appointee, must reside within the Washington metropolitan area. § 2456(e)(2); *see* S. Rep. No. 193 at 13; J.A. 17.

Congress' deliberations, however, also reflected a concern that service could decline at National under local control. *See* Plaintiffs' Exhibit in the United States District Court ("Pl. Ex.") 1 at 15 ("[t]hese Members can be expected to seek assurance that a new airport authority will have national as well as local interests in mind"). The Washington airports are, of course, used by citizens throughout the United States who travel from their home residences to the nation's Capital for business (public or private) or pleasure. § 2451(3); *see* 132 Cong. Rec. S3295 (daily ed. Mar. 25, 1986) ("constituents need to come to Washington, DC, to petition the Federal Government, to petition Congress") (statement of Sen. Pressler). Not surprisingly, Members of Congress, among the more frequent users of the Washington airports, rely upon the availability of convenient air services to and from their home districts. *See, e.g., Proposed Transfer of Metropolitan Washington Airports: Hearings on H.R. 2337, H.R. 5040 and S. 1017 before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation*, 99th Cong., 2d Sess. 110 (1986) (hereinafter "Hearings") ("Members of Congress are heavy users of

the air transportation system. Your busy schedules include many trips back to your districts. You depend on the ability to get to the airport quickly, to park quickly, to get to the airplane quickly.") (statement of Secretary Dole); 132 Cong. Rec. S3294 (daily ed. Mar. 25, 1986) ("I think any Senator who has gone through National Airport, and that is all of us in the last week or two, recognizes that something is seriously wrong with that airport.") (statement of Sen. Danforth); Pl. Ex. 1 at 4 ("business travelers and Members of Congress like the convenience of [National] airport").

To protect the interests of nationwide users, Congress added a condition to the transfer. To be an eligible lessee, the nonfederal regional authority would agree to create a board of review under state law with disapproval power over certain of its Board of Directors' actions. § 2456(f).[3] The Board of Review would be composed of nine Members of Congress whom the Board of Directors would appoint and who would be required to function "in their individual capacities, as representatives of users of the Metropolitan Washington Airports." § 2456(f)(1); *see also* Bylaws of the Metropolitan Washington Airports Authority ("Bylaws"), art. IV, § 1 (Mar. 4, 1987) (Pet. App. 148a, 151a). The Authority's Directors would agree to appoint the Board of Review from lists of nominees submitted by the Speaker of the House and the President *pro tempore* of the Senate.[4] *Id.* Members of the Board of Review would be nominated from specified aviation-related committees (except for one at-large member,

[3] In an advisory letter addressed to the Chairman of the House Subcommittee on Aviation, Assistant Attorney General for Legislative and Governmental Affairs John R. Bolton, Esquire, addressed the constitutionality of several proposals to require a board of review and concluded that the type of proposal ultimately adopted by Congress would be constitutional. *See* J.A. 25-35.

[4] The Authority's Board of Directors also has the right to reject any Member on the nominee lists and to request additional names. *See infra* 9.

chosen alternately from the House or Senate). *Id.* To ensure that the Board of Review would represent nationwide user interests (and not duplicate the local interests protected by the Board of Directors), Members of Congress from Virginia, Maryland and the District of Columbia were ineligible. *Id.*

The Authority would agree to submit certain of its decisions to the Board of Review at least 30 days before those decisions are to become effective.[5] § 2456(f)(4)(A); *see also* Bylaws, art. IV, § 4 (Pet. App. 153a). An action would take effect unless the Board of Review were to disapprove it and state reasons therefor within the specified time period. § 2456(f)(4)(C); Bylaws, art. IV, § 4 (Pet. App. 153a). To preserve the delicately crafted balance of local and nationwide user interests inherent in the governing structure, Congress provided that the lease should include a provision preventing the Authority from taking certain major actions if the Board of Review were barred from carrying out its functions as a result of a judicial order. § 2456(h); *see also* Bylaws, art. IV, § 9 (Pet. App. 154a). But Congress also indicated that, even if that were to occur, lease conditions should not prevent the Authority from conducting routine operations or from continuing to meet previously authorized obligations and capital expenditures requirements. § 2456(f)(4)(D); *see also* Bylaws, art. IV, § 5 (Pet. App. 153a-154a).

[5] These specified actions include: (i) the authorization for the issuance of bonds; (ii) the adoption, amendment or repeal of a regulation; (iii) the adoption or revision of a master plan (including land acquisition proposals); and the appointment of the chief executive officer. § 2456(f)(4)(B); *see also* Bylaws, art. IV, § 4 (Pet. App. 153a). In addition, the Authority would agree to submit the adoption of an annual budget to the Board at least 60 days before it is to become effective. § 2456(f)(4)(A); *see also* Bylaws, art. IV, § 4 (Pet. App. 153a).

D. Negotiating And Accepting The Lease Conditions.

On March 2, 1987, the Secretary and the Authority concluded negotiations and voluntarily entered into a lease (effective June 7, 1987), which was also signed by the Governor of Virginia and the Mayor of the District of Columbia. *See* Lease of the Metropolitan Washington Airports Authority ("Lease") (Pet. App. 163a). Under the Lease, the powers of the Secretary are to be construed in accordance with federal law, while the powers of the Authority are "construed in accordance with and governed by Virginia law." (Pet. App. 184a). That Lease, which incorporated provisions that are consistent with the Transfer Act, provided, *inter alia*, for the establishment of a Board of Review. Lease, art. 13 (Pet. App. 175a-178a).

Two days later, the Authority's Board of Directors adopted Bylaws pursuant to the Virginia and District of Columbia statutes. Those Bylaws required the Directors to establish a Board of Review and appoint thereto "representatives of the users of the Metropolitan Washington Airports who will serve in their individual capacities." Bylaws, art. IV (Pet. App. 151a-154a). The Bylaws provide for the composition and specific powers of the Board of Review, consistent with provisions of the Lease and the Transfer Act. *Id.*; *see supra* 6-7.

In negotiating the Lease, the Authority could have relied exclusively on the language contained in the enabling statutes of Virginia and the District giving "general consent . . . to conditions imposed by the Congress" as sufficient state authority to establish the Board of Review. Both jurisdictions, however, chose to amend their enabling legislation to make explicit the Authority's power to establish the Board under *state* law. *See* 1987 Va. Acts ch. 665, § 5.A.5 (Pet. App. 111a); D.C. Law 7-18, § 3(c)(2) (1987) (Pet. App. 143a).

E. Appointing The Members Of The Board Of Review.

By September 2, 1987, the Board of Directors had completed its review of the lists of nominees provided by the Speaker of the House and the President *pro tempore* of the Senate and appointed the nine Board of Review members. The Speaker of the House had provided a list of six congressional committee member nominees for four positions on the Board of Review; the President *pro tempore* of the Senate had provided a list of four nominees for four other Board positions. The Directors discussed whether to request additional Senate nominees or reject one or more of the nominees submitted, but ultimately decided that neither would be necessary. *See* J.A. 57. In the two resolutions appointing the Board of Review members, the Board of Directors fixed the terms of each of the appointments by a drawing, but reserved the right to remove a member of the Board of Review for cause prior to the conclusion of his or her term. *See* Res. No. 87-12 (June 3, 1987) (J.A. 47-48); Res. No. 87-27 (Sept. 2, 1987) (J.A. 60).

F. Adopting The Master Plan.

In October 1987, the Authority proposed a Master Plan for the renovation of Washington National Airport. After receiving comments from citizens groups including respondents, local governments and the general public, the Authority's Board of Directors adopted a resolution approving the proposed Master Plan. J.A. 70-71. Under the Master Plan, a new terminal will be built to replace the outmoded existing terminal. The new terminal will have the same number of aircraft gates (44). *See* J.A. 89-90; *see also* Pl. Ex. 16 at 3. To alleviate problems of ground congestion and inadequate public parking, the Master Plan also provides for a new dual level roadway system and parking structures. *Id.* The Master Plan does not change the number of runways, runway length or width, or runway orientation. *Id.* Nor will the Master

Plan increase the number of scheduled flights. Indeed, a provision in the Lease prevents the Authority, and the Transfer Act itself directly prohibits the FAA, from increasing or decreasing the number of permitted aircraft operations or slots (landing and takeoff rights). Lease, art. 11.F(1) (Pet. App. 172a); § 2458(e)(1).

The Authority submitted the Master Plan to the Board of Review on March 16, 1988. At the Board of Review's April 13, 1988 meeting, members asked a series of questions on the Plan's impact on traffic and aircraft noise levels. J.A. 73-78. In response, the Authority's General Manager stated that the Master Plan for rehabilitating National does not increase air carrier operations. J.A. 74; *see also* J.A. 89-90; J.A. 70-71 ("The Board of Directors is satisfied that the proposed Master Plan . . . will not bring about an increase in air traffic"). Nor does the Plan increase noise or address actions that can be taken to reduce aircraft noise. J.A. 74-75; J.A. 91 (plan was designed to be "noise neutral"). The Board was informed that various noise abatement measures were being considered by the Authority in a Part 150 noise study.[6] J.A. 75-76; J.A. 92. Assured that the Master Plan had no direct effect on traffic or noise and that other forums were available to concerned citizens in which to address the noise issue, the Board of Review on April 13, 1988 voted unanimously not to disapprove the National Airport Master Plan. J.A. 78.[7] The Board took no further action on the Master Plan.

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[6] FAA Regulation Part 150, 14 C.F.R. § 150 (1990), establishes a process for the nation's major airports to engage in planning to develop a noise compatibility program.

[7] In only one instance has the Board of Review disapproved an action by the Board of Directors. On August 9, 1988, the Board of Review voted to disapprove a revision of the Authority's regulations that would have allowed high occupancy vehicles to use the Dulles Access Highway temporarily. Concerned about the negative impact on airport traffic service levels and the difficulty of converting the Highway back to exclusive airport use, the Board of Review disapproved the revision, stating that "the use of the access highway by carpools, unrelated to airport use, is inconsistent with the purpose for which it was built, and is contrary to the interests of the users of the Airport." J.A. 83-84. Respondents have not claimed that this solitary action of disapproval by the Board of Review had any effect on them.

G. District Court Proceedings.

In November 1988, respondents brought this action seeking declaratory and injunctive relief against the Airports Authority and its Board of Review. Respondents—a citizens group and two individual members of that group—claimed that they are injured by aircraft noise and safety problems allegedly caused by the implementation of a Master Plan for National that the Authority adopted and the Board of Review did not alter or disapprove. Respondents' lawsuit, however, is not based on environmental or safety statutes. Rather, respondents mount a constitutional challenge to the mere existence of the Board of Review's unexercised disapproval power. Cross-motions for summary judgment were filed, with the Authority contending that the state-created Authority and its Board of Review abridge no provisions of the Constitutions of the United States or Virginia, which law applies to the Authority's powers under the terms of the Lease. The Authority also raised issues of ripeness and standing.

On July 20, 1989, the district court (Judge Joyce Hens Green) upheld the constitutionality of the Board of Review. 718 F. Supp. 974 (D.D.C. 1989) (Pet. App. 29a). The court first held that respondents had standing since their alleged injuries were "fairly traceable to the Master Plan" which would, the court found, "facilitate" increased air travel to and from National. (Pet. App. 41a). Reaching the merits, the district court ruled that the Board of Review was not a federal entity, did not exercise federal power, had no members appointed by or subject to removal by Congress and, therefore, presented no violation

of separation of powers principles or of the Appointments, Incompatibility, or Ineligibility Clauses of the Constitution.[8]

H. Appellate Proceedings.

On appeal to the United States Court of Appeals for the District of Columbia Circuit, a divided panel concurred with the district court's ruling on standing but reversed on the merits. The majority (Buckley, J. and Wald, then-C.J.) found that the Board of Review is in effect an agent of Congress and therefore cannot constitutionally exercise executive power. Judge Mikva (now-C.J.) dissented, stating that he would affirm the district court's decision and uphold "a delicately-balanced and innovative institution of federalism." (Pet. App. 27a). On December 6, 1990, the court of appeals stayed issuance of its mandate pending the filing of a petition for writ of certiorari (Pet. App. 28a), and pursuant to Fed. R. App. P. 41(b), the mandate remains stayed.

On December 10, 1990, the Airports Authority petitioned for a writ of certiorari. Respondents did not oppose the granting of the petition. *See* Brief in Response to Petition for a Writ of Certiorari. The United States also filed a brief in support of Supreme Court review. In addition, the Commonwealth of Virginia filed a brief as *amicus curiae* in support of petitioners, stating that the court of appeals' decision "undermines the concept of federalism" by ignoring the fact that the Board of Review derives all of its powers directly from the state-created Airports Authority pursuant to the nearly identical statutes of the Commonwealth and the District of Columbia. *See* Brief of the Commonwealth of Virginia as *Amicus*

[8] In a related case involving the identical constitutional claim brought by different plaintiffs in an entirely different factual setting, the district court (Judge Lewis F. Oberdorfer) also ruled in favor of the Authority. *See Federal Firefighters Ass'n, Local 1 v. United States*, 723 F. Supp. 825, 826 (D.D.C. 1989) (Pet. App. 57a).

Curiae in Support of Petitioners ("Va. Cert. Pet. Br.") at 1.

SUMMARY OF ARGUMENT

This is not a federal separation of powers case. No constitutional provision or doctrine precludes the Commonwealth of Virginia and the District of Columbia from establishing an independent nonfederal Airports Authority. Nor is such nonfederal Authority precluded from establishing, pursuant to state law, a Board of Review and appointing thereto Members of Congress to serve in their individual capacities as representatives of the airport users. Nor is there any constitutional reason why that Authority cannot negotiate voluntarily a lease of federal property conditioned upon the establishment of such a review board.

The Founding Fathers made a considered choice to permit Members of Congress to hold office in state government or state-created agencies. Several early Members did so themselves. Such dual federal and state office-holding is fully consistent with the Ineligibility and Incompatibility Clauses of the U.S. Constitution, which prohibit Members of Congress from holding only other *federal* offices. The Appointments Clause also applies only to the appointment of *federal* officers. Thus, no express provision of the Constitution precludes members of the Board of Review from undertaking the functions assigned to them by the state-empowered Authority.

The decision by the court below holding such a Board of Review unconstitutional constitutes an unprecedented and unwarranted intrusion of the federal separation of powers doctrine into legitimate state activity. The court completely ignored the fact that the Board was established by the nonfederal Airports Authority, derives its powers from state law, and consists of Members of Congress appointed by, removable by, and accountable to the nonfederal Authority—not Congress. But for the volun-

tary and independent actions of Virginia, the District of Columbia and the regional Authority, there would be no Board of Review performing functions relating to the local airports—functions that do not impinge upon the federal Executive which itself negotiated the lease conditions providing for such Board of Review.

The court below extended implicit separation of powers principles beyond their intended bounds by mischaracterizing the nature of the Board of Review and the functions and responsibilities of its members. Such members do not serve as "agents of Congress"; they do not "wield federal power." To impute such a status to the Board members flies in the face of the language of the Transfer Act, which directed the Secretary to negotiate lease provisions empowering the Authority to appoint Board members who, as individuals, not as legislators, represent airport users. Such lease provisions are the basis for the Bylaws from which the members derive their powers. The flawed reasoning of the court below ignores the plain meaning of the federal statute, the Lease and the Bylaws and constitutes an assault on this Court's longstanding precedent that statutes should be reasonably construed so as to save them from constitutional infirmity.

Congress' Property Clause powers further support its direction to the Secretary to include a provision for a state-appointed Board of Review in the airports Lease to which Virginia and the District could consent. It is fully consistent with this Court's precedent that the federal government may induce states to agree voluntarily to take actions that the federal government constitutionally may not be able to accomplish directly.

Moreover, the private parties who have brought this suit are without standing. Their alleged injury—a potential increase in aircraft noise—is purely speculative and not fairly traceable to any action of the Board of Review or its mere existence. Nor would the elimination of the Board redress such an injury.

In this case, there is no inter-branch dispute at any level of government, nor does any branch contend that another impermissibly intrudes upon its constitutionally assigned functions. Under these circumstances, an unprecedented extension of the separation of powers doctrine into state-federal relations is completely inappropriate and would undermine a successful and innovative venture in creative federalism.

ARGUMENT

I. THE CONSTITUTION PERMITS VIRGINIA, THE DISTRICT OF COLUMBIA, AND THE AIRPORTS AUTHORITY THAT THEY CREATED, TO APPOINT MEMBERS OF CONGRESS TO SERVE ON THE NONFEDERAL AUTHORITY'S BOARD OF REVIEW.

The constitutionality of the Airports Authority's Board of Review is anchored in a fundamental decision taken at the Constitutional Convention in Philadelphia. That Convention specifically considered and rejected a ban on the simultaneous holding of congressional and state offices.[9] Consequently, nothing in the Constitution prohibits states from appointing individuals who are members of Congress to positions created by state law.

The historical practice of the Founders after ratification further supports a reading of the Constitution that permits members of Congress to hold nonfederal offices.

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[9] *See II Elliott's Debates* vol. 5 at 127, 378, 420-25, 503, 505-06 (2d ed. 1836) (rejecting proposal that national legislators be ineligible for state-established office). The Framers feared that barring dual federal and state officeholding would unduly limit the pool of talented citizens to one level of government or the other. As Madison noted, "[t]he Legislature of Virg[inia] would probably have been without many of its best members, if in that situation, they had been ineligible to Congs. to the Govt. & other honorable offices of the State." 1 M. Farrand, *The Records of the Federal Convention of 1787*, 389 (1937). Roger Sherman maintained that a state ineligibility requirement would be equivalent to "erecting a Kingdom at war with itself." *Id.* at 386.

For example, George Leonard served simultaneously as a Massachusetts Representative to the First and Second Congresses and as a member of the Massachusetts State Senate. *Biographical Directory of the United States Congress, 1774-1989*, 1364 (1989). George Thatcher, a fellow Representative from Massachusetts to the First through Sixth Congresses simultaneously served as a state district judge in Maine for an eight-year period. *Id.* at 1923. Similarly, Philip John Schuyler had overlapping periods of service in both the New York State and the United States Senates.[10] *Id.* at 1778. This contemporaneous practice by the Founders offers weighty evidence that the Constitution does not prohibit dual state and federal officeholding by Members of Congress. *Bowsher v. Synar*, 478 U.S. 714, 723-24 (1986) (actions by Members of the First Congress provide contemporaneous and weighty evidence about the meaning of the Constitution); *see Mistretta v. United States*, 488 U.S. 361, 399 (1989) (Constitution does not prevent extrajudicial service by federal judges).[11]

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[10] While the Constitution does not prohibit dual officeholding, states, of course, remain free to place limitations on their own officers. For example, Charles Carroll served simultaneously in the Maryland State and United States Senates from March 1789 through November 1792. But when Maryland passed a law disqualifying members of the State Senate who also held seats in Congress, Carroll resigned from the U.S. Senate because he preferred to remain a State Senator. *See Biographical Directory of the United States Congress, 1774-1989*, 748 (1989). Likewise, Aedanus Burke, a Representative from South Carolina to the First Congress, declined to be a candidate for reelection because his simultaneous service as a judge on the state circuit court was threatened when the legislature passed a law prohibiting state judges from leaving the state. *See id.* at 704.

[11] In recent years, the Governor of Maryland has appointed a Member of Congress to the state Legal Services Board, the Governor of Massachusetts has appointed Members of Congress to the Board of Directors of the Massachusetts Centers for Excellence and the Governor of California has appointed a Member of Congress to the Commission of the Californias. *See, e.g.*, Defendants' Exhibit

The well-established practice of the Founding Fathers demonstrates not only that Members may hold nonfederal office but also that nonfederal officials (including the Authority's Board of Directors) are free to appoint such Members. Nothing in the Constitution prohibits a nonfederal official from appointing a Member of Congress to serve in a nonfederal executive, judicial or legislative capacity. That the members of the Board of Review are appointed by a nonfederal Authority is readily apparent from the express language of the relevant statutes, the starting point for any such analysis. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979).

A. The Virginia And District Of Columbia Acts As Well As The Language Of The Transfer Act Make Clear That The Airports Authority And Its Board Of Review Are Independent, Nonfederal Entities Created Pursuant To State Law.

The 1985 Acts of the Commonwealth and the District, following the Holton Commission's recommendations, expressly created the Authority as a regional body, "independent" of both federal and state government. 1985 Va. Acts ch. 598, § 2 (Pet. App. 89a); D.C. Law 6-67, § 3 (1985) (Pet. App. 122a). Those Acts empowered the Authority to negotiate for the transfer of the airports subject to appropriate lease conditions to be established by Congress. *See supra* 4. In the 1986 Transfer Act, Congress built upon the foundation already in place and authorized the Secretary of Transportation "to enter into a lease of the Metropolitan Washington Airports with the Airports Authority . . . ." § 2454(a). The Transfer Act expressly recognized that this state-created Authority was to have only "the powers and jurisdiction as are conferred upon it jointly by the legislative authority of the Commonwealth of Virginia and the District of Columbia," § 2456(a), and was to be "independent of the . . . Federal Government." § 2456(b)(1). Having passed

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in the United States District Court 9; Washington Post, November 3, 1988 at M.2.

legislation delegating to the Secretary the power to negotiate with a regional, independent Authority a lease that was to contain certain minimum conditions, Congress' role ceased.[12]

In authorizing the Secretary to enter into a lease with the Authority, the Transfer Act makes clear that it is the independent nonfederal Authority that would establish a Board of Review. § 2456(f)(1). Consistent with that condition, the Secretary and the independent Authority negotiated a Lease that defined the powers and composition of the Board to be established. Lease, art. 13 (Pet. App. 175a-178a). Even then, however, the Board of Review could not come into being until the Authority adopted Bylaws, pursuant to state law, establishing such a Board. The Bylaws set forth the composition and powers of the Board, which were consistent with the terms of the Lease. Bylaws, art. IV (Pet. App. 151a-154a). Because the Authority was created pursuant to reciprocal D.C. and Virginia legislation, and its Bylaws were adopted pursuant to those nonfederal statutes, the Board of Review and the powers it exercises are likewise creatures of state law.

The court of appeals wholly ignored this series of voluntary and intervening actions, agreements and enactments on the part of the federal Executive, Virginia, the District and the independent Authority. Instead the court below erroneously concluded that "it is federal law that resulted in the establishment of the Board of Review with its particular composition and authority." Pet. App. 12a. But congressional suggestion does not render subsequent independent state actions federal ones. Had the legislatures of Virginia and the District not enacted their enabling statutes, the Authority would not have existed. Had the Authority not entered into a Lease

[12] Congress did provide that if the Secretary entered into a lease, it could not take effect until thirty days after submission to Congress. § 2454(d). No one questions the constitutionality of that report and wait provision. *See Sibbach v. Wilson*, 312 U.S. 1 (1941).

with the Secretary, and then adopted Bylaws pursuant to its enabling statutes and consistent with the Lease, the Board of Review would not have existed. That the federal act authorizing transfer of the airports to an independent Authority "contemplates the Board's creation does not alter the Board's fundamental state parentage." (Pet. App. 22a) (Mikva, J. dissenting).

Recognizing that the Authority and its Board of Review are empowered by and function pursuant to state law is fully consistent with this Court's holding that the officials of an agency created pursuant to an interstate compact act under color of *state law*, for purposes of 42 U.S.C. § 1983, when carrying out functions under that compact. *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 399-400 (1979). This is so even though the interstate compact is federally approved. Indeed, it would be unprecedented, as the Commonwealth of Virginia notes, Va. Cert. Pet. Br. at 8, if state legislation, and state officials acting pursuant thereto, were suddenly federalized simply because that independently-adopted state legislation harmonized with a congressional statute.

B. Express Constitutional Provisions, Such As The Incompatibility Or Ineligibility Clause, Draw A Bright Constitutional Line Between Federal And Nonfederal Officeholding By Members Of Congress, Allowing Members To Serve On The Board Of Review In Their Individual Capacities.

Consistent with the Founders' decision to allow dual state and federal officeholding, both the Incompatibility and the Ineligibility Clauses expressly prohibit Members of Congress from serving only in another *federal* office. There is no such bar to service in an individual capacity in any state-created office or as a member of a public corporate body independent of the federal government. The Ineligibility Clause provides that "[n]o Senator or Representative shall, during the Time for which he was

elected, *be appointed to any civil Office under the Authority of the United States*, which shall have been created, or the Emoluments whereof shall have been increased during such time." U.S. Const. art. I, § 6, cl. 2 (emphasis added). Analogously, the Incompatibility Clause provides that "no Person *holding any Office under the United States*, shall be a Member of either House during his Continuance in Office." U.S. Const. art. I, § 6, cl. 2 (emphasis added).

Members of the Authority's Board of Review hold office pursuant to the Bylaws of the Authority, which functions pursuant to the laws of the Commonwealth of Virginia and the District of Columbia. Because Authority officials, including the Board of Review, are therefore not "exercising significant authority pursuant to the laws of the United States," *Buckley v. Valeo*, 424 U.S. 1, 126 (1976), they are not officers of the United States. It thus follows that neither the Ineligibility nor the Incompatibility Clause prohibits Members of Congres from serving in an individual capacity on that state-created Board. *See Signorelli v. Evans*, 637 F.2d 853, 861-62 (2d Cir. 1980) (because of concern that general government might out-recruit state governments, Incompatibility Clause bars only dual *federal* officeholding).

That members of the Board of Review are not acting as Members of Congress wielding federal power also is apparent from the plain language of the Transfer Act. The Act unambiguously states that the members of the Board of Review are to function "in their individual capacities, as representatives of users of the Metropolitan Washington Airports." § 2456(f). The Lease and Bylaws similarly require the Directors to appoint to the Board of Review representatives of users who will serve in their individual capacities. Lease, art. 13.A (Pet. App. 175a); Bylaws, art. IV, § 1 (Pet. App. 151a). Because the Transfer Act is clear on its face that even though the Board is composed of Members of Congress, they are to function in their individual capacities as representatives of the users of airports exercising state power, this Court need look no further. *See Burlington N.R.R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987) ("'[w]hen we find the terms of a statute unambiguous, judicial inquiry is complete'") (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).[13] Similar to the statute at issue in *Mistretta v. United States*, 488 U.S. 361 (1989), Members of Congress here serve on the Board of Review not pursuant to their authority as elected congressional officials but because of their appointment as individuals by the Authority's Board of Directors, as the Transfer Act makes clear. *Id.* at 404 ("judges serve on the Sentencing Commission not

[13] Relying on the Act's plain meaning also comports with this Court's well-established duty to construe the statute so as to save it from any constitutional infirmities. *See, e.g., NLRB v. Catholic Bishop*, 440 U.S. 490, 499-501 (1979). The court below attempted to sidestep this duty by stating that it did not reach the issue of whether appointment to the Board of Review would violate the Incompatibility or Ineligibility Clause of the Constitution (Pet. App. 19a). But if, as the court concluded, the Board of Review "wields federal power" (Pet. App. 10a) and if its members are acting as "agents" of Congress (Pet. App. 18a) then inevitably the Board's appointees are "exercising significant authority pursuant to the laws of the United States," *Buckley v. Valeo*, 424 U.S. at 126, in contravention of these constitutional clauses. Such a conclusion requires the court below to ignore the express language of the Transfer Act, the Virginia and D.C. statutes, and the Lease and Bylaws of the Authority concerning the nature of the appointing authority and the functions of the review board appointees. Ignoring this express language in order to impute to Congress an intent to violate the Incompatibility and Ineligibility Clauses as well as the Appointments Clause and separation of powers doctrine would severely undermine this Court's well-established precedent that a statute should be construed so as to avoid constitutional problems. On the other hand, accepting the plain meaning of Congress' direction that Board appointees serve in their nonfederal, individual capacities causes the underpinnings of the court of appeals' separation of powers contentions to unravel because it is not Congress or its agents but individuals who also happen to be Members of Congress who "partake[] of an executive function" (Pet. App. 15a). *See infra* Section II.

pursuant to their status and authority as Article III judges, but solely because of their appointment by the President as the Act directs").

To the extent that this Court need look beyond the Transfer Act's language, its legislative history underscores that "Members of Congress are heavy users of the air transportation system." Hearings at 110 (statement of Secretary Dole). As one member commented, "I spend half my life at these airports." 132 Cong. Rec. S2992 (daily ed. Mar. 19, 1986) (statement of Sen. Hollings). Given their frequent use of and need for services at these two airports, it made eminent sense to have individuals who are Members of Congress represent the interests of airport users. *See* 132 Cong. Rec. S3293 (daily ed. Mar. 25, 1986) ("[m]ost Members are intensely interested in the amount of service to and from certain cities, from both National and Dulles") (statement of Sen. Kassebaum). That Members of Congress serve on the Board of Review does not make that Board either Congress or an agent of Congress. This situation is no different from *Mistretta*, where the presence of judges on the independent Sentencing Commission did not make that Commission a court. 488 U.S. at 394.

It also is a perfectly rational legislative judgment to have the members of the Board of Review be drawn from those committees most familiar with and involved in aviation issues (along with one person chosen alternately from Members of the House and Senate at large).[14] As in *Mistretta*, the "special knowledge and expertise" of these appointees would enhance their value as representatives of airport users. *See* 488 U.S. at 396. Because the individuals from Congress are users of the airports

[14] Restricting the Authority's appointments to members of selected committees does not unduly limit the universe of eligible appointees: As many as 105 members of the House and 47 Senators serve on the relevant committees. Of course, 417 House members and 96 Senators are eligible for the at-large appointment.

and knowledgable about aviation matters, they are particularly well suited for insuring that the airports of the nation's Capital serve the various users.[15] *See* 132 Cong. Rec. H11106 (daily ed. Oct. 15, 1986) ("[a] board of review composed of Congressmen is created to protect the interests of all users of the two airports.") (statement of Rep. Hammerschmidt).

C. Congress Has Not Unduly Encroached On The Constitutional Appointment Powers Of The Executive.

By establishing conditions for the federal lease of airport properties, the Transfer Act did not constitute an unconstitutional encroachment by Congress upon the appointment powers of the coordinate federal Executive branch. The power to appoint members of the Board of Review as well as to remove them is vested in the non-federal Authority.

1. *Congress Has Not Interfered With the Appointments Authority of the Executive.*

The court below misconstrued the Appointments Clause cases of this Court in holding that impermissible institutional ties existed between Congress and the Board of Review. Pet. App. 17a-18a. Even respondents concede that the Authority, not Congress, appoints the Board of Review. Brief for Appellants (December 1, 1989) ("App. Br.") at 32-33. In contrast to *Buckley v. Valeo*, 424 U.S. 1 (1976), where this Court held that the Appointments Clause does not authorize Congress to vest appointment of Federal Election Commissioners in itself, Congress did not assume an appointment function more properly entrusted to another federal branch when it passed the Transfer Act.

[15] Indeed, the one instance when the Board of Review disagreed with an action taken by the Board of Directors reveals that the Board of Review is in fact representing the interests of users. *See supra* note 7.

The Transfer Act, the Lease and the Authority's Bylaws provide that the nonfederal officials on the Board of Directors (who are appointed by the Governors of Virginia and Maryland, the Mayor of the District, and the U.S. President) are to appoint the Board of Review from lists of nominees submitted by Congress. § 2456(f)(1); Lease, art. 13.A (Pet. App. 175a-176a); Bylaws, art. IV, § 1 (Pet. App. 151a-152a). The Lease requirement that the Board of Directors select members of the Board of Review from lists submitted by the Speaker of the House and the President *pro tempore* of the Senate raises no more concerns than the appointment process approved by this Court in *Bowsher v. Synar*, 478 U.S. 714 (1986), and *Mistretta*. In *Bowsher*, this Court was not troubled that the Comptroller General was nominated by the President from a list of three individuals recommended by the Speaker of the House and the President *pro tempore* of the Senate. *Bowsher*, 478 U.S. at 727. Similarly, this Court upheld Congress' power to require the President to appoint three federal judges to the Sentencing Commission after considering a list of six judges recommended by the Judicial Conference of the United States. *Mistretta*, 488 U.S. at 410 n.31. Congress often places conditions on the way in which an appointing authority may exercise its power of appointment. Sometimes appointments to a board must be bipartisan. *See, e.g.*, 42 U.S.C. § 2996c(a) (1988) (Board of Directors of Legal Services Corporation shall consist of eleven members no more than six of whom may be of same political party). Sometimes appointees must be selected from lists of potential nominees. As long as the appointing authority retains ultimate responsibility in the selection of the appointees, these conditions are constitutional, even in circumstances, unlike here, where the Appointments Clause is directly applicable.[16]

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[16] *See* 20 Weekly Comp. Pres. Doc. 1690, 1691 (Oct. 30, 1984) (Secretary of Transportation retains ultimate responsibility to appoint members of Motor Vehicle Safety Review Panel because she may refuse to appoint persons submitted on lists by the Senate or House transportation committees or request additional lists).

Most importantly, the Authority's appointment of the Board of Review is not analogous to the direct legislative appointment power that this Court rejected in *Springer v. Government of the Philippine Islands*, 277 U.S. 189 (1928), and upon which respondents so heavily relied in the courts below. In *Springer*, as in *Buckley v. Valeo*, the Philippine legislators usurped for themselves the appointment powers of the coequal executive—the Philippine Governor-General. The legislature did so by passing a statute that placed the voting power of government stock in several national corporations, which power the Governor-General had exercised exclusively, in a board that was composed of the Governor-General, the President of the Philippine Senate and the Speaker of the House. These three persons voted their shares to elect a Board of Directors, which in turn elected the managing agents from among their own number.

This Court, construing the Organic Act of the Philippine Islands as it applied to these coequal *coordinate* territorial branches of government, concluded that the legislature could not assume for itself the Governor-General's power to appoint. *Springer*, 277 U.S. at 203, 205. In this case, Congress has neither vested appointment power in itself nor has it impermissibly interfered with either the state or federal executive's appointment power. Indeed, because the Directors of the Authority and the Board of Review members are not federal officers, the strictures that the Appointments Clause places on Congress' power to vest the appointment authority outside the federal Executive branch are not directly implicated here. *Cf. Morrison v. Olson*, 487 U.S. 654 (1988).

2. *Congress Has Not Attempted to Gain a Role in the Removal of Executive Officials.*

A central theme in this Court's separation of powers decisions has been that Congress cannot "draw to itself, or to either branch of it, the power to remove or the right to participate in the exercise of" removal of a federal executive officer. *Myers v. United States*, 272 U.S. 52, 161 (1926). In both *Bowsher* and *Myers*, this Court found that Congress had impermissibly but expressly reserved for itself the power to remove a federal officer charged with the execution of federal laws. The federal statute at issue in *Myers* granted the President power to remove certain postmasters of the United States *only* "by and with the advice and consent of the Senate." 272 U.S. at 56. In *Bowsher*, the federal statute provided that the Comptroller General was removable solely at the initiative of Congress, not only by impeachment but also by joint resolution of Congress for, among other things, inefficiency or malfeasance. 478 U.S. at 728. This Court invalidated those arrangements on the ground that the "Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts." *Bowsher*, 478 U.S. at 722. Indeed, "[t]o permit the execution of the laws to be vested in an officer answerable only to Congress would, in practical terms, reserve in Congress control over the execution of the laws." *Id.* at 726.

The Transfer Act differs strikingly from the statutes at issue in *Bowsher* and *Myers*. Nothing in the Transfer Act authorizes Congress to interfere with the removal of the Authority's officials. The President has authority to remove his appointee to the Board of Directors for cause. § 2456(e)(4). There are no other express removal provisions in the federal act. The Virginia and the District of Columbia enabling statutes, as well as the Authority's Bylaws, additionally provide that the Directors may be removed for cause in accordance with the laws of the

appointing jurisdiction. 1985 Va. Acts. ch. 598, § 4.E (Pet. App. 90a); D.C. Law 6-67, § 5(e) (1985) (Pet. App. 124a); Bylaws, art. I, § 1.d (Pet. App. 149a). Accordingly, the Governors of Virginia and Maryland and the Mayor of the District retain the authority to remove their appointees to the Board of Directors. *See, e.g.*, Va. Code Ann. § 24.1-79.6 (1985); D.C. Code Ann. § 1-309 (1987).

Further, the Board of Directors passed Resolutions Nos. 87-12 and 87-27, adopted in accordance with the Bylaws of the Authority, confirming its power to remove members of the Board of Review for cause. J.A. 47-48; J.A. 60. These Resolutions, particularly given the statutory silence on removal authority, are consistent with two long-standing principles adhered to by this Court. First is the principle that removal authority is vested in the appointing authority in the absence of expressed legislation to the contrary. *Carlucci v. Doe*, 488 U.S. 93, 99 (1988); *Myers v. United States*, 272 U.S. 52, 119 (1926); *Ex Parte Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839). As James Madison noted during the first session of the First Congress: "The power of removal result[s] by a natural implication from the power of appointment." 1 Annals of Cong. 496 (J. Gales ed. 1789).[17] The second relevant principle that this Court follows is to accord a narrow or literal construction to statutes in order to avoid constitutional problems that might otherwise arise. *See Morrison v. Olson*, 487 U.S. 654, 682 (1988); *DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council*, 485 U.S. 568, 575 (1988). An appropriate reading of the Transfer Act would vest removal authority over the Board of Review in the very Board of Directors that holds the appointing power. In fact, even respondents conceded that the absence of congressional removal power "eliminates one source of unconstitutionality." *See* App. Br. at 35.

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[17] Virginia's law is to the same effect. *See McDougal v. Guigon*, 68 Va. (27 Gratt.) 133 (1876).

The court of appeals, however, ignored these time honored principles and instead engaged in a speculative reading of the federal statute that neither party had argued. The court reasoned that because the Transfer Act states that the Board of Review must "consist of" Members of specified House and Senate committees, Congress effectively exercises removal power over the Board of Review by virtue of each House's right to remove any of its Members from any committee at any time. Pet. App. 18a. This peculiar construction of the Transfer Act has never been tested in practice. *Cf. Morrison v. Olson*, 487 U.S. at 682 (provision for termination of office of independent counsel had never been tested). And there is nothing in the record before this Court to support the proposition that by removing from one of the designated congressional committees a person who also serves on the Board of Review, Congress could terminate that official's nonfederal Board service. Indeed, the negotiated Lease and the Authority's Bylaws, which establish the operative terms of appointment and tenure, do not even contain the "consist of" language upon which the lower court premised its tortured statutory analysis. Instead, both the Lease and the Bylaws provide that the Board of Directors "shall appoint" Members of the specified committees. Lease, art. 13.A (Pet. App. 175a-176a); Bylaws, art. IV, § 1 (Pet. App. 151a-152a).

Just as this Court found that the court of appeals had overstated the matter in *Morrison v. Olson* when it described the Special Division's power to terminate an independent counsel as a "broadsword and . . . rapier," 487 U.S. at 682, this Court should find that the same appellate court overstated and misinterpreted the terms of the Transfer Act when it concluded that Congress had the power to remove members of the Board. Unlike *Bowsher* and *Myers*, this case does not involve an express attempt by Congress to gain a role for itself in the removal of executive officials, much less federal officials appointed by

the President. Nor, when read in light of longstanding principles of statutory construction and the Resolutions authorizing the Board of Directors to remove members of the Board of Review for cause, does the Transfer Act even implicitly raise the spectre of the improper exercise of removal power by Congress.

II. NEITHER THE TRANSFER ACT NOR THE BOARD OF REVIEW VIOLATES FEDERAL SEPARATION OF POWERS PRINCIPLES.

The court below did not invalidate any particular provision of the Transfer Act. Nor did it point to any express provision of the Constitution, such as the Appointments, Incompatibility or Ineligibility Clause, as grounds for invalidating the congressional statute. Instead, the lower court erroneously found that "the Board of Review, as currently constituted, unconstitutionally vests executive functions in an agent of Congress," (Pet. App. 19a), and concluded that "the Board is prohibited by the constitutional doctrine of the separation of powers from carrying out those functions." Pet. App. 2a.

This conclusion of the court below, extending the separation of powers doctrine aritculated by this Court in *INS v. Chadha*, 462 U.S. 919 (1983), to the Authority-created Board of Review, reaches far beyond the intended boundaries of well-established precedent. In *Chadha*, this Court noted that "[t]he Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial." 462 U.S. at 951. Separation of powers principles, as defined by this Court, give meaning to the Constitution's allocation of the sovereign power of the *federal* government among its three *coequal* branches. *Id.* The doctrine may be violated if one federal branch interferes impermissibly with another's performance of its constitutionally assigned functions. *See Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 433 (1977). It also may be violated when one federal branch assumes a function that

is more properly entrusted to another federal branch. *See Youngstown Sheet & Tube Co.*, 343 U.S. 579, 587 (1952); *see generally Mistretta*, 488 U.S. at 383; *INS v. Chadha*, 462 U.S. at 963 (Powell, J., concurring). However, this Court has never invalidated on separation of powers grounds a congressional statute that allegedly interfered with Executive powers, unless the challenged action also trenched on some express provision in the Constitution. *See Buckley v. Valeo*, 424 U.S. at 118-24 (congressional action compromises the President's art. II appointment power); *Myers v. United States*, 272 U.S. at 176 (same); *Springer v. Philippine Islands*, 277 U.S. at 200-01 (same); *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872) (Act of Congress impinges on Executive's art. II, § 2 pardon power); *see generally INS v. Chadha*, 462 U.S. at 999-1000 (White, J., dissenting).

Here, notwithstanding the court of appeals' *ipse dixit*, there is no evidence that the Board of Review is either an agent of Congress (indeed, all evidence is to the contrary) or exercising functions more properly entrusted to the federal Executive. As with other interstate compacts, Congress' conditional consent to creating the Airports Authority neither transformed it into a federal agency nor altered the fact that the Board of Review's authority is derived from state laws and the Bylaws of the independent Authority. *See Seattle Master Builders Ass'n v. Pacific Northwest Elec. Power & Conservation Planning Council*, 786 F.2d 1359, 1365 (9th Cir. 1986), *cert. denied*, 479 U.S. 1059 (1987). As an integral part of the decisionmaking structure of a nonfederal regional Airports Authority, the Board performs functions that are commonly performed by local airport authorities throughout the nation. Tellingly, the federal Executive branch, whose powers respondents argue are infringed, is not contesting the creation of the Board of Review. Indeed, the federal Executive fully supports the Board of Review and the federal statute at issue here. And this Court has never invalidated a statute because of undue

intrusion on the Executive branch when that branch has expressly declined to oppose the law. *Cf. United States ex rel. Stillwell v. Hughes Helicopters, Inc.*, 714 F. Supp. 1084, 1086-87 (C.D. Cal. 1989).[18]

Nor is it clear how the Board could function as an agent of Congress or aggrandize Congress' powers. The Board has no status as a congressional entity.[19] In contrast to the Comptroller General in *Bowsher*, the Board of Review does not have responsibilities that create a relationship with Congress. Unlike the Comptroller General, the Board of Review does not report to Congress; it does not investigate or analyze matters to help Congress in its decisionmaking process; its responsibilities are not framed in terms of obligations to Congress or work on behalf of Congress. *Compare Bowsher*, 478 U.S. at 741 (Stevens, J., concurring). At base, because Congress has

[18] There is good reason why the federal Executive branch neither opposed the Board of Review nor considered it an intrusion upon its constitutional powers. It was members of the federal Executive branch who initially sought to transfer local airport responsibilities to a regional authority, who appointed the Holton Commission, who sought congressional authorization to lease the airport to a nonfederal authority, who advised Congress on how user interests could be integrated constitutionally into the governing structure, who signed the Transfer Act into law, and who negotiated the lease of the airports to the nonfederal Authority, providing for a Board of Review. Moreover, the federal Executive branch retains the powers and responsibilities over the metropolitan Washington airports that it exercises with respect to all commercial airports nationwide, *e.g.*, air traffic control and the regulation of navigable airspace, safety, airport certification and compliance. In sum, the Transfer Act provided the means by which the Executive branch was able to relinquish local operation of the airports for which it was not well suited and retain only the powers that were appropriately federal.

[19] Indeed, respondents' complaints that they are "disenfranchised," that the Board of Review "promote[s] the interests of users," and "that Members of Congress who represent local interests cannot serve on the Board of Review" are fully consistent with the reality that the Board is not an arm of Congress but a group of individuals representing airport users. *See* Pl. Ex. 13 at 3; Pl. Ex. 14 at 2-3.

neither the power to appoint the Board of Review nor to remove its members if they take actions with which Congress disagrees, *see supra* 26-29, the Board of Review is not a subterfuge for congressional control.

Significantly, neither respondents nor the court of appeals has cited a single case in which an Act of Congress was held to violate the separation of powers doctrine because it infringed on the powers of a nonfederal, noncoordinate branch. This absence of authority confirms that separation of powers is a principle that fundamentally operates horizontally—between the coordinate federal branches of government. That doctrine has limited, if any, application vertically in regulating the interrelationship between the federal government and the states.

That separation of powers concerns are limited to interference by one federal branch with a coordinate federal branch is well illustrated by *Kwai Chiu Yuen v. INS*, 406 F.2d 499 (9th Cir.), *cert. denied*, 395 U.S. 908 (1969). In that case, a Chinese alien, whose narcotics conviction had been pardoned by a state governor, challenged a congressional statute that disallowed gubernatorial pardons of such convictions from overriding the deportation orders of the U.S. Attorney General. The court concluded that the doctrine of separation of powers "has no application in the area of federal-state relations." *Id.* at 501. Here too, where an Act of Congress indirectly affects only a *nonfederal* entity, separation of powers principles are equally inapplicable. *See Nixon v. Administrator*, 433 U.S. at 433; *Buckley v. Valeo*, 424 U.S. at 122.

Fundamentally, this simply is not a case like *INS v. Chadha*, 462 U.S. 919 (1983), where Congress, after it had legislated, continued to intrude upon authority delegated to the federal Executive. Here, Congress in no way interfered with the authority it delegated to the Secretary to determine whether to enter into a lease with the nonfederal Airports Authority.

Even before Congress passed the Transfer Act, the legislative bodies of Virginia and the District had enacted laws creating a regional Authority. The Secretary entered into an arms-length lease agreement with that independent Authority. Had the Secretary determined that any of the conditions that Congress attached to the transfer established a congressional role that was impermissible, she could have refused to conclude the negotiations. The Mayor of the District of Columbia and the Governor of Virginia signed the Lease. They too could have withheld their consent had they concluded that Congress was intruding unduly. Thus, the executive and legislative branches of both the federal and state governments are in agreement here—all concurred in the creation of a nonfederal Airports Authority and in the Lease conditions. There is no interbranch conflict—at the federal or state level—as to whether the Transfer Act or actions taken pursuant to it are constitutional. Because the political branches have acted at the apogee of their power, this Court should be at its most deferential, resisting attempts to expand separation of powers concepts into areas to which they do not apply. *See Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981); *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 637-38 (1952) (Jackson, J., concurring).

III. CONGRESS CONSTITUTIONALLY MAY CONDITION A TRANSFER OF PROPERTY ON STATE CREATION OF A BOARD OF REVIEW COMPOSED OF MEMBERS OF CONGRESS.

The reasoning of this Court's decision in *South Dakota v. Dole*, 483 U.S. 203 (1987), provides yet another ground why Congress in the Transfer Act constitutionally could condition the lease of federal property on the establishment by a nonfederal entity of a Board of Review. In *South Dakota*, this Court ruled that even if Congress lacked authority, in light of the Twenty-first Amendment, to legislate a national minimum drinking age directly, it

nonetheless could employ its broad powers under the Spending Clause to make existence of a state minimum drinking age law a condition on the use of federal highway funds. *South Dakota v. Dole*, 483 U.S. at 206. If the states chose to accept such a condition by agreeing to legislate in areas where states constitutionally can, but Congress cannot, then the states would help Congress achieve objectives beyond its immediate constitutional reach. That is, an "independent constitutional bar" on direct congressional action is not "a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly." 483 U.S. at 210.

In this case, the Court need not decide whether Congress itself could create the Board of Review as currently structured. Here, Virginia and the District agreed to pass legislation creating the Authority, which established its own Board of Review, in order to become eligible for the transfer of property. The Property Clause provides that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2. Because this Court has " 'repeatedly observed' " that " '[t]he power over the public land thus entrusted to Congress is without limitations,' " *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 580 (1987) (citations omitted), Congress' discretion to act under the Property Clause is at least as broad as its power under the Spending Clause.

No one questions that under federal law, Virginia and the District of Columbia constitutionally could agree jointly to pass reciprocal legislation creating a Board of Review to which nonfederal officers would appoint Members of Congress functioning in their individual capacities.[20] Because the states (or a state and the District)

[20] Nor does the Virginia Constitution or state law prevent the Authority from appointing this Board of Review. The states themselves are not bound by the federal doctrine of separation of powers

constitutionally can compact to do so, Congress constitutionally may prescribe the same actions as conditions of eligibility for the lease of United States property. The lesson of *South Dakota*, equally applicable to Congress' Spending Clause or Property Clause powers, is that even assuming Congress is not empowered to achieve certain objectives directly, it nonetheless may achieve them indirectly. *See also Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959) (Congress may request states to waive Eleventh Amendment immunity as a condition to congressional approval of an interstate compact); *accord Oklahoma v. Civil Serv. Comm'n*, 330 U.S. 127, 143 (1947) (although Congress has no power to regulate local political activities of state officials, it may request states to do so and withhold federal funds for a state's failure to comply). What Congress may not do is induce the states to engage in activities that the *states* could not constitutionally perform, such as to discriminate on the basis of race in administering the leased airports property. *South Dakota*, 483 U.S. at 210.

The court below ignored this Court's test in *South Dakota v. Dole* and instead concluded that Congress may not induce the states "to circumvent the functional constraints placed on [Congress] by the Constitution" (Pet. App. 14a). There is no support in this Court's decisions, however, for a two-tiered Constitution, in which certain functional separation of powers constraints, only implicit in the Constitution, are elevated above other prohibitions such as the Twenty-first Amendment or the Appointments

and nothing in the Constitution suggests the contrary. *Dreyer v. Illinois*, 187 U.S. 71, 84 (1902); *see also Sweezy v. New Hampshire*, 354 U.S. 234, 256 (1957) (Frankfurter, J., concurring). A state determines for itself how power shall be distributed among its governmental organs. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461 n.6 (1981). Virginia applies its separation of powers doctrine in a flexible, pragmatic way. *Baliles v. Mazur*, 297 S.E.2d 695, 700 (Va. 1982); *accord Infants v. Virginia Hous. Dev. Auth.*, 272 S.E.2d 649, 658 (Va. 1980); *see also* Va. Code Ann. § 2.1-33.8 (Supp. 1990).

Clause. The issue as defined by this Court is whether Congress can induce the states to do something voluntarily that everyone concedes the states themselves have the power to do. The simple answer here is that Congress can.

Nor is this a case in which Congress is offering financial inducements that are so coercive as to transform encouragement into compulsion. *See Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937). Virginia and the District were not the recipients of federal largesse and thus did not face the prospect of *losing* federal grant funds that they otherwise would have received, as in *South Dakota*, if they did not consent to the federal conditions. To the contrary, they agreed to create a regional authority that, *inter alia*, would reimburse the federal government for past capital investments, pay $3 million annual rent (subject to an inflation adjustment), pay unfunded pension expenses, assume a substantial financial commitment for future rehabilitation and improvement of the airports, and make a $23.6 million payment to the Civil Service Retirement and Disability Fund. Lease, arts. 12.B, 16; S. Rep. No. 193, 99th Cong., 1st Sess. 5-6 (1985). Virginia, the District, and the Authority they created, freely assumed these responsibilities because they concluded that the Lease arrangements in their entirety were both constitutional and in the interests of their constituents and airport users throughout the nation.

IV. THE COURT OF APPEALS' DECISION TO GRANT RESPONDENTS STANDING WAS INCONSISTENT WITH ARTICLE III LIMITATIONS.

To establish standing for Article III purposes, a party must show that (1) there is a personal injury fairly traceable to the challenged action or conduct; and (2) the injury is likely to be redressed by the requested relief. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). The court below found, contrary to the record evidence, *see infra* 37-38, that the Master Plan "provides for a significant increase in air traffic." Pet. App. 9a. The court then reasoned that respondents' harm from noise and air pollution is "fairly traceable" to the Master Plan, which the Board of Review did not disapprove, "because only with the Board of Review in operation can the Authority carry it out." *Id.* The court below also found that a favorable ruling would redress respondents' alleged injuries "because if the Board's actions are invalidated,"—even though the Board took no action with respect to the Master Plan—"then, under the provisions of the Act, the Authority will be unable to implement the Plan and continue expansion." *Id.* Neither the record, nor the Transfer Act and other applicable statutes, nor Supreme Court precedent support this tortured reasoning.

A. Respondents' Alleged Injuries Are Not Fairly Traceable To Petitioners' Conduct.

Respondents allege that they have been "adversely affected by the noise, vibrations, and the environmental consequences of the air traffic going to and from [National]" for "the past 38 years" in one case, (Pl. Ex. 14 at 1), and for 19 years in another (Pl. Ex. 15 at 1). Thus, these asserted injuries cannot be fairly attributed to the challenged Board of Review (in existence for only three and one-half years) and a Master Plan that is only now being implemented, as opposed to other factors. This Court requires respondents to show that the Board of Review's vote not to disapprove the Master Plan is more than merely one of the independent actions leading to respondents' asserted injuries. *See Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 42-44 (1976); *Warth v. Seldin*, 422 U.S. 490, 507 (1975).

Respondents cannot do so, however, because the noise and environmental issues long associated with National are caused by a variety of factors, none of which are attributable to the Board of Review's existence or the implementation of the Master Plan. The Master Plan is a plan to renovate and rehabilitate the aging facilities at

National and is designed to be "noise neutral."[21] J.A. 91; *see supra* 9-10. It maintains the existing runways; provides for the same number of gateways as exist today; and does not increase the number of permissible flights.[22]

Moreover, under federal law and the terms of its Lease, the Authority has virtually no ability to restrict (or increase) aircraft operations or limit the number of passengers at National.[23] It is not the Master Plan but the airlines and the FAA which will determine the number of

[21] While it is true that the Master Plan provides for gate improvements that will accommodate new widebody aircraft more effectively, the use of such aircraft would occur only if the FAA certifies the new aircraft for use at National. Moreover, since these aircraft are substantially quieter than those they will replace, the renovation of airport facilities to accommodate them actually could ameliorate some of the problems of which respondents complain. J.A. 91. Similarly, the renovations called for under the Master Plan, if anything, will increase airport safety and reduce traffic congestion by bringing National Airport "up to contemporary standards." Pl. Ex. 16 at 1.

[22] The courts below attributed the modest growth in air traffic shown in the forecasts prepared for the Master Plan to the Master Plan itself (Pet. App. 9a; Pet. App. 41a). Such growth, however, is not a result of airport layout changes but rather is an estimate of the increasing number of quieter, new technology aircraft that will be able to comply with existing nighttime noise limits. J.A. 91; Pl. Ex. 16 at 1. These technological advances and any resulting airline procurement choices will occur irrespective of the Master Plan.

[23] Congress required lease conditions prohibiting the Authority from increasing or decreasing the number of operations or slots permitted under the FAA's High Density Rule and from limiting the number of passengers at National. § 2454(c)(5)(C). Congress also has prohibited the FAA from decreasing the number of slots permitted under its Rule, except for reasons of safety. § 2[illegible]e)(1). The FAA, not the Authority, continues both to administer the High Density Rule and to certify widebody aircraft for service at National and other airports. Further, the FAA retains exclusive jurisdiction over airspace, including, *inter alia*, matters of safety and air traffic control, airspace congestion and noise abatement procedures. 49 U.S.C. §§ 1348, 1431 (1988).

aircraft operations, the aircraft flight patterns and the aircraft types operated at National. J.A. 91.

Attempts to link the Master Plan and respondents' harms are far too strained to establish standing, given the constraints in the Authority's Lease and the critical role played by third parties' decisions. *See Simon v. Eastern Ky.*, 426 U.S. at 42-44 (denying standing to a group of indigents challenging an IRS ruling because it was "purely speculative" whether the alleged denials of hospital service could be fairly traced to the IRS or simply resulted from the hospitals' independent decisions); *see also Allen v. Wright*, 468 U.S. 737, 759 (1984). Here, it is at least as speculative whether there will be any increases in noise, pollution or safety problems that could be traced to the "noise neutral" Master Plan or whether such increases, if in fact they materialize, instead would be the result of decisions made by the airlines and the FAA with or without the Master Plan or the Board of Review.

B. Respondents' Requested Relief Will Not Redress Their Claimed Injuries.

Equally important, respondents cannot show that there is a "substantial likelihood" that a judgment in their favor will redress their claimed injury. *See Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 75 n.20 (1978). Respondents seek to declare the Board of Review's disapproval power unconstitutional and to enjoin the Airports Authority from either performing functions that require Board review or implementing the Master Plan. J.A. 4. Here, as a matter of law, invalidating the Board of Review and enjoining certain actions by the Authority would not affect the level of air service. *See* §§ 2454(c)(5)(C), 2458(e)(1). Nor would such relief have any predictable effect on the injuries of which respondents complain. Indeed, because under the terms of the Lease and its Bylaws the Authority would be pre-

vented from taking any action that requires submission to the Board of Review if the Board is invalidated, the effect of respondents' requested relief would be to preclude the Authority from taking specific action to address the very concerns that respondents raise, *e.g.* by issuing noise-related regulations within the Authority's power. Lease, art. 13.H (Pet. App. 178a); Bylaws, art. IV, § 9 (Pet. App. 154a). Respondents' claim that they would be better off if the Authority were unable to take certain actions in the future is probably wrong and, in any event, is sheer conjecture of the sort insufficient to support a claim of standing. *See Warth v. Seldin*, 422 U.S. 490, 507 (1975) (petitioners' assertion of standing fails because they "rely on little more than the remote possibility . . . that their situation might have been better had respondents acted otherwise, and might improve were the court to afford relief")[24]; *Linda R.S. v. Richard D.*, 410 U.S. 614, 618-19 (1973).

[24] Congress directed that the Lease require the Authority to operate and *develop* both National and Dulles and encouraged the expeditious completion of the Master Plan. §§ 2454(c)(1), 2455(a); *see also* S. Rep. No. 193, 99th Cong., 1st Sess. 11, 13 (1985). Thus, respondents in essence seek to invoke this Court's assistance in forcing Congress again to consider and address issues that they unsuccessfully asked Congress to address in 1986. Hearings at 266-67 (statement of Annette D. Davis).

CONCLUSION

For all of the foregoing reasons, petitioners respectfully request that this Court reverse the decision below on the merits and uphold the constitutionality of the non-federal Airports Authority including its Board of Review or reverse the decision below in view of respondents' lack of standing.

Respectfully submitted,

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